STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 154779

CARL RENE BRUNER II,
Defendant-Appellant.

Third Circuit Court No. 14-008324-FC
Court of Appeals No. 325730

SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER OF JULY 7, 2017

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Statement of Issue Presented

I.

***Bruton* only applies when a codefendant's testimonial statement incriminating the other defendant is introduced in a joint trial. In this case, there were no testimonial statements made by the codefentant introduced at defendant's joint trial. Is *Bruton* applicable here?**

The People answer: "No."
The trial court answered, "No."
The Court of Appeals answered, "No."
Defendant answers: "Yes."

Statement of Facts

Victim Marcel Jackson was shot in the back and killed outside the Pandemonium Club in Detroit in the early morning hours of June 20, 2012. Victim Wayne White was also shot in the back that evening, but survived because he was wearing a bullet-proof vest. Defendant and his codefendant, Michael Lawson, were tried jointly in the Wayne County Circuit Court for the shootings. Defendant, the shooter, was convicted on December 4, 2014, before the Honorable Craig Strong of first-degree murder, assault with intent to murder, felon in possession of a firearm, and felony firearm.[1] Codefendant Michael Lawson, who was tried under an aiding and abetting theory, was convicted of second-degree murder and assault with intent to murder.[2] The defendants shared a single jury.

Trial and Sentencing of Defendant Bruner

Darnell Price, a security guard working at the Pandemonium Club the evening of June 19, 2012, heard a disturbance near the DJ booth on the second floor around midnight.[3] When he saw a man and woman fighting with each other, he restrained the man. Price identified the man as defendant and said defendant was acting "irate

[1]MCL 750.316(a); MCL 750.83; MCL 750.224f; MCL 750.227b.

[2]MCL 750.317; MCL 750.83.

[3]References to the trial record are cited by the date of the hearing followed by the page number; 11/24, 5-9.

and agitated" and "just ready to fight" while Price and another guard forced him down the stairs and then forcefully tossed him out of the club.[4] All of this was captured on video, which was played for the jury.[5] After defendant was thrown out of the club, Price heard him really aggressively say, "I'll be back."[6]

Around 2:30 a.m., Price noticed defendant standing by the exit door of the club saying he wanted back into the club to find his phone. After being told he could come in only if he agreed to be searched for weapons first, he refused to be searched, saying "ain't nobody touching me."[7] Accordingly, he was denied access.[8] Roughly a half-hour later, around 3:00 a.m., Price was standing outside the club with a few other security officers when he observed a gray Charger circling the block. He noticed that defendant was in the passenger seat as the vehicle went slowly around the block. When the vehicle circled around again, he noticed it stop at the corner and then come towards them again, but this time without defendant in the passenger seat. The guards became suspicious when they noticed defendant was suddenly not in the vehicle. When the car stopped across the street, they looked to see the driver get out

[4] 11/24, 5-14.

[5] *Id.* at 17.

[6] *Id.* at 114.

[7] *Id.* at 26.

[8] *Id.* at 23-26.

of the vehicle. As that was happening, they then heard multiple shots coming at them from behind them.[9]

Several other security guards also testified. Wayne White—who was shot in the back, but lived thanks to a bullet-proof vest[10]—testified that he also interacted with defendant when he came back to the club to get his phone. He testified that defendant was hostile and refused to be searched.[11] He likewise noticed defendant getting into the passenger side of the gray Charger and saw Lawson and defendant circling the block multiple times until eventually defendant was no longer in the passenger seat. He then heard shots coming from behind him. He identified defendant as the man who was hostile at the club, was standing outside the club, and was the passenger in the gray Charger circling the block immediately before the shootings.[12]

The manager of the club, Dennis Smith, testified that he noticed defendant punch a female twice in the DJ booth.[13] He pulled defendant away and then additional security guards came and forced him out of the club. He later noticed that

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[9] *Id.* at 27-33.

[10] *Id.* at 140, 146, 157.

[11] *Id.* at 124-126.

[12] *Id.* at 124-146.

[13] 11/25, 5, 8-10.

defendant wanted back into the club, but refused to be searched for weapons.[14] Then, until the time he left the club around 2:30 a.m., Smith noticed defendant leaning against a pole outside of the club.[15] Another guard, Deandre Mack, also remembered seeing a man being thrown out of the club shortly after midnight. He noticed the man outside making hand gestures at the other guards and could see him saying something along the lines of "you are going to get yours" as he pointed "like I'm going to get you." He also identified defendant.[16]

The victim's mother, Carolyn Warrior, testified that she actually knew defendant and that he was "like a son" to her. Indeed, just over a week before the shooting, she met with defendant because he was putting money in her incarcerated son's prison account. She noticed him driving a gray Charger when they met. They had a friendly meeting and she continued to talk to him on a regular basis up until her son's death. After her son was killed, she never heard from him again.[17] Defendant's girlfriend, Terri Lopez, testified that she was supposed to meet up with defendant the

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[14] *Id.* at 12-14.

[15] *Id.* at 15-17.

[16] 11/25, 111-118.

[17] 11/21, 31-38. Various other witnesses testified to the investigation and physical evidence, which is not relevant to the issue presented here.

night of the shootings, but defendant told her via text that he was not coming over.[18] After the shootings, she did not hear from him again for a year.[19]

The People also intended to call witness Westly Webb, Lawson's acquaintance whom he spoke to in the days after the shooting, to testify at trial against both defendants. After much searching, however, the People were unable to locate Webb. The Court found due diligence and declared the witness unavailable. Because Webb had only testified at codefendant Lawson's preliminary exam and not defendant's, the People agreed that Webb's testimony could only be admitted against Lawson. The preliminary exam testimony was redacted to replace defendant's nickname, "Box," with "Blank," and the entire preliminary exam testimony was read into the record.[20] The jurors were instructed both before Webb's testimony and again during jury instructions that Webb's testimony could only be used against codefendant Lawson, not defendant.[21]

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[18]11/25, 177, 185.

[19]*Id.* at 178.

[20]12/1, 4-17.

[21]*Id.* at 17, 75, 89-90. Lawson's attorney called Brian Huff, who testified that he was there that night to pick up his cousin, Deandre Mack. Huff testified that he was eating a sandwich in his car when he saw a man get out of the Charger and then heard shots coming from behind him. After the shooting, he heard the guards trying to figure out what happened. 12/1, 52-54.

During closing arguments, defendant argued that the People had not proven beyond a reasonable doubt that defendant was the shooter.[22] Lawson argued that the People had not proven that Bruner was the shooter and had, therefore, not proven that Lawson aided and abetted Bruner in the shooting.[23] Following closing arguments and jury instructions,[24] both defendants were convicted.

Defendant was sentenced as a habitual-fourth offender on January 5, 2015, to serve concurrent terms of life for first-degree murder, 450-900 months for assault with intent to murder, and 40-60 months for felon in possession of a firearm, plus two consecutive years for felony firearm.[25] Additional facts may be presented *infra* in the Argument section of this brief.

Testimony of Wesley Webb

Before the second day of jury selection, the prosecutor asked the court for a decision on his motion in limine to call witness Wesley Webb to testify against both

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[22]12/2, 5-19.

[23]*Id*. at 20-32; 12/3, 8-22. In the middle of codefendant's closing argument, defendant's counsel asked for a mistrial because Lawson's attorney referenced Webb's statement in regard to Bruner. The prosecutor reiterated that the jury was properly instructed, and the trial court denied the motion. 12/3, 4-7.

[24]12/3, 69-90; 12/4,

[25]1/5, 16. Lawson, who was convicted of second-degree murder and assault with intent to commit murder, was sentenced as a habitual-fourth offender on March 6, 2015, to serve concurrent terms of 480-900 months in prison for both convictions. His case was later remanded for a *Crosby* hearing.

defendants. Specifically, the prosecutor stated that Webb would testify to a statement codefendant Lawson made to him about the shooting. Citing *People v Taylor*,[26] the People argued that Lawson's statement to Webb was a non-testimonial statement against Lawson's penal interest, thereby creating no Confrontation Clause or hearsay issue. The court granted the People's motion over defendant's objection.[27]

But, after the completion of the People's case, Webb was still not present to testify. After the prosecutor detailed the efforts that were made to locate Webb, the trial court found due diligence and deemed Webb unavailable. The People then made a motion to read into the record Webb's prior recorded preliminary-exam testimony to be used only against codefendant Lawson because Webb had only testified at Lawson's preliminary exam. Over objection from defense counsel, the court granted the motion and said that the testimony could be admitted with the proper limiting instruction so that the jury would not use the statement against Bruner. The People redacted the statement to replace defendant's nickname, "Box," with "Blank."[28] Before Webb's former testimony was read, the court instructed the jurors that they

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[26]*People v Taylor*, 482 Mich 368, 377 (2008).

[27]11/20, 4-10.

[28]12/1, 4-16.

could only use Webb's testimony against Lawson, not Bruner.[29] The entire testimony, including the cross-examination, was then read into the record.

Webb testified that he had an unrelated criminal case and that he made a deal to testify truthfully in this case in exchange for a reduced sentence in his own case. He went on to testify that he knew codefendant Lawson as "Lucky." In June of 2012, a couple days after the shooting, he recalled having a conversation with Lawson where the codefendant told him that the police were looking for him because of an incident that happened at the club. Specifically, he told Webb that "'Blank' got into it with his girl in the club, bouncers put him out, roughed him up." Lawson said the two then left the club and rode around in Blank's gray Charger.[30]

After they rode around, Lawson told Webb that he let Blank out of the car and then pulled in front of a tavern, got out of his car, and smoked a cigarette. While that was happening, he heard gunshots, got in his car, and drove away. Afterwards, Blank told Lawson that he had a ride so Lawson left. When Webb was asked whether Lawson saw Blank with a gun, he initially just said they had a gun with them. After

[29] *Id.* at 16-17.

[30] *Id.* at 17-21.

being impeached with his police statement that said Lawson saw Blank with a gun, Webb then said he did not word it that way.[31]

On cross-examination, Lawson's counsel asked Webb if he was only testifying so that he could get a deal in his own case. Counsel went into Webb's criminal history and inquired as to why it took Webb so long to come forward with this information. Webb stated that Lawson never told him Blank had a gun or that Blank committed a shooting. When asked about his statement saying they left and then Blank came back with a gun, he denied saying that and said he was not paying attention when he signed the statement.[32]

During the prosecutor's closing argument, he stressed that Webb's testimony could only be used against Lawson, not Bruner. And, during jury instructions, the jury was again instructed that they could not consider Lawson's statement or Webb's testimony against Bruner.[33]

Appellate History

Both defendant and codefendant Lawson appealed their convictions to the Court of Appeals. Defendant argued that the introduction of Webb's testimony

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[31] *Id.* at 20-29.

[32] *Id.* at 24-30.

[33] 12/3, 75, 88-90.

violated his confrontation rights and that there was insufficient evidence to convict him.[34] The Court of Appeals affirmed his convictions, holding (1) that the Confrontation Clause was not implicated here because the statement at issue was non-testimonial and that the limiting instructions assured the statement was not admitted against defendant, and (2) that there was sufficient evidence to convict defendant.

Defendant then filed an Application for Leave to Appeal, and this Court ordered oral argument on whether to grant the application. In doing so, the parties were instructed to address: "(1) whether the admission of Westley Webb's preliminary-exam testimony at the defendant's joint trial with Michael Lawson violated the defendant's constitutional right to confrontation, despite the trial court's redaction of that testimony and limiting instructions to the jury, see *Gray v Maryland*, 523 US 185 (1998); *Bruton v United States*, 391 US 123 (1968); and (2) if so, whether the error in admitting the testimony was harmless, *see People v Carines*, 460 Mich 750, 774 (1999)." This supplemental brief follows.

[34]Defendant also raised several claims in his Standard 4 brief, none of which are relevant here. In Lawson's appeal, he argued that his counsel was ineffective for failing to make a motion for severance, that Webb's testimony was erroneously admitted against him, that there was insufficient evidence, that the evidence was against the great weight of the evidence, and that he was entitled to a remand under *Lockridge*. Lawson's convictions were affirmed, but his case was remanded for a *Crosby* hearing. This Court denied leave.

Argument

I.

Bruton only applies when a codefendant's testimonial statement incriminating the other defendant is introduced in a joint trial. In this case, there were no testimonial statements made by the codefentant introduced at defendant's joint trial. _Bruton_ is inapplicable here.

Standard of Review

Whether a defendant's Sixth Amendment right of confrontation has been violated is a question of constitutional law that this Court reviews *de novo*.[35]

Discussion

Bruton only applies when, during a joint trial with a single jury, the People introduce the testimonial confession of a codefendant that implicates the defendant and the codefendant does not testify. In this case, the People never presented a testimonial confession of codefendant Lawson implicating defendant Bruner, so *Bruton* is inapplicable. To the extent there still could have been a Confrontation Clause issue because defendant did not have the opportunity to cross-examine Webb, any such potential error was extinguished when the jury was correctly and repeatedly instructed that Webb's testimony could not be used against defendant. Further, even

[35] *People v Fackelman*, 489 Mich 515, 524 (2011).

if one assumes the jurors disregarded their instructions and considered the testimony against defendant, any such error was harmless in light of the fact that Webb was thoroughly cross-examined by the codefendant's attorney, nearly all of the information contained in the statement was cumulative to the other evidence already properly admitted at trial, and there was substantial other evidence that defendant was the shooter.

A. The admission of Webb's testimony against codefendant Lawson regarding Lawson's non-testimonial statement was not a *Bruton* violation because *Bruton* only applies to testimonial codefendant confessions.

As a general rule, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant.[36] "This accords with the almost invariable assumption of the law that jurors are presumed to follow their instructions,"[37] which our United States Supreme Court has applied in a myriad of circumstances.[38]

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[36]*Richardson v Marsh*, 481 US 200, 206 (1987); MRE 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.).

[37]*Id.*

[38]See e.g. *Harris v New York*, 401 US 222 (1971)(holding that statements elicited from a defendant in violation of *Miranda v. Arizona*, 384 US 436 (1966), can be introduced to impeach that defendant's credibility, even though they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly); *Spencer v Texas*, 385 US 554 (1967)(holding that evidence of the defendant's prior criminal convictions could be introduced for the purpose of a sentencing

In *Bruton*, however, our Supreme Court carved out a very narrow exception to this longstanding principle.[39] There, two defendants were tried jointly before the same jury. One had confessed to the police, naming and incriminating the other defendant. The trial judge admitted the confession against only the codefendant, and issued a limiting instruction telling the jury to only consider it against the codefendant who had confessed and not the defendant named in the confession.[40] Despite the limiting instruction, *Bruton* held that a defendant is deprived of his Sixth Amendment right of confrontation when the confession of a nontestifying codefendant is introduced at their joint trial. Specifically, the Court stated:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial...."[41]

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enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt); *Tennessee v Street*, 471 US 409, 414–416 (1985)(holding that a limiting instruction to consider an accomplice's incriminating confession only for purpose of assessing truthfulness of defendant's claim that his own confession was coerced was sufficient to cure any Confrontation Clause issue).

[39] *Bruton v United States*, 391 US 123 (1968).

[40] *Id.* at 124-125.

[41] *Id.* at 135–136 (citations omitted).

Bruton's holding was expanded in *Gray v Maryland*,[42] where the Court held that the introduction of the nontestifying codefendant's confession violates a defendant's confrontation rights even when the jurors are properly instructed and the confession is redacted to delete defendant's name or replace his name with "deleted." The Court noted that replacing defendant's name with an obvious blank "will not likely fool anyone" and again focused on the "powerfully incriminating" nature of a codefendant's confession.[43] Both of the statements at issue in *Bruton* and *Gray* involved confessions made during custodial interrogation.

Since *Bruton* and *Gray*, our Supreme Court has decided *Crawford v Washington*[44] and *Davis v Washington*,[45] both of which altered the landscape of our Confrontation Clause jurisprudence. In *Crawford*, the Supreme Court held that the Confrontation Clause is only implicated when the statement at issue is testimonial.[46] In *Davis*, the Court elaborated on this, holding specifically that the Confrontation Clause does not apply to non-testimonial statements, that is, statements that are not

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[42]*Gray v Maryland*, 523 US 185, 193 (1998).

[43]*Id.* at 193 (1998). But see *Richardson v Marsh*, 481 US 200 (1987)(holding there is no *Bruton* violation where the jury is given a limiting instruction and the codefendant's confession is redacted to eliminate any reference whatsoever to the defendant's existence.)

[44]*Crawford v Washington*, 541 US 36 (2004).

[45]*Davis v Washington*, 547 US 813 (2006).

[46]*Crawford*, *supra*, 541 US at 68.

intended to be used in a future criminal prosecution.[47] *Davis* noted that the clause only restricts the admissibility of testimonial statements because "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."[48] "While non-testimonial statements are subject to traditional rules limiting the admissibility of hearsay, they do not implicate the Confrontation Clause."[49] After *Crawford* and *Davis*, the "threshold question"[50] in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause "has no application."[51]

In the years since *Crawford* was decided, several federal appellate courts have examined *Bruton's* holding through the lens of *Crawford*. In doing so, the courts have repeatedly held that a *Bruton* analysis is wholly unnecessary when the statement at issue is non-testimonial.[52] Because it is premised on the Confrontation Clause, the

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[47]*Davis, supra*, 547 US at 821.

[48]*Id.*

[49]*Taylor, supra*, 482 Mich at 377, citing *Davis, supra*, 547 US at 821.

[50]*United States v Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010).

[51]*Whorton v Bockting*, 549 US 406, 420 (2007).

[52]*See e.g. United States v Taylor*, 509 F.3d 839, 850-851 (7th Cir. 2007)(no *Bruton* error in the admission of a non-testimonial statement because "hearsay evidence that is non-testimonial is not subject to the Confrontation Clause"); *Whorton v Bockting, supra*; *United States v Johnson*, 581 F.3d 320, 326 (6th Cir. 2009); *United States v Dargan*, 738 F.3d 643, 650-651 (4th Cir. 2013)(holding that *Bruton* is "simply irrelevant in the context of non-testimonial statements"); *United States v Berrios*, 676 F.3d 118, 128 (3rd Cir. 2012)(holding that *Bruton* is inapplicable to a

Bruton rule, like the Confrontation clause itself, does not apply to non-testimonial statements.[53] In other words, out-of-court statements which are non-testimonial—such as a codefendant's casual statement to an acquaintance—are admissible against a defendant without implicating the Confrontation Clause. In those circumstances, the admissibility of the statement turns only on the hearsay rules, not on the Sixth Amendment.[54]

In this case, Webb's testimony that was read into the record and admitted only against codefendant Lawson involved two different levels of hearsay: (1) the non-testimonial statement Lawson made to Webb, which is the only reason Webb's testimony was relevant in the first place, and (2) the fact that Lawson's statement was admitted at trial via Webb's prior recorded testimony. As to the first level, there was no *Bruton* error because there was no testimonial statement; Lawson's statement was to an acquaintance. And as to the second level, there was no *Bruton* error because

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non-testimonial prison yard conversation because "*Bruton* is no more than a by-product of the Confrontation Clause"); *United States v Figueroa-Cartagena*, *supra*; *United States v Dale*, 614 F.3d 942, 958-959 (8th Cir. 2009).

[53]*United States v Johnson*, 581 F.3d 320, 326 (6th Cir. 2009).

[54]*Crawford, supra,* 541 US at 51 ("An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.").

there was still no testimonial statement made by a codefendant; Webb was merely a vehicle through which Lawson's non-testimonial statement was admitted.

1. Lawson's statement to Webb presents no *Bruton* issue because it was non-testimonial.

There is little question under Michigan law that, had Webb appeared to testify at trial, his testimony regarding what Lawson told him would have been admissible against *both* defendants without any sort of Confrontation Clause problem.[55] This Court analyzed a similar issue in *People v Taylor*.[56] In that case, the trial court admitted a codefendant's non-testimonial statement to an acquaintance through the testimony of the acquaintance against both the codefendant and defendant.[57] This Court held that the admission of the codefendant's hearsay statement to the acquaintance did not implicate the Confrontation Clause because it was non-

[55]While there might have been a hearsay issue, the People presented Lawson's statement as a statement against penal interest admissible against Bruner under MRE 804(b)(3) because the statement shows Lawson knew there was a gun in the car when he was driving around with defendant immediately before the murder. At trial and again in appellant's Court of Appeals brief, defendant argues that it was not actually a statement against interest because Lawson did not actually admit to any specific wrongdoing (besides, potentially, being around a gun despite the fact that he had a prior felony conviction). But, as the People argued, the statement *in context* lent support to the People's argument that he was not merely present because he was aware there had been a gun in the car when he let defendant out of the car before the shootings. See *Williamson v United States*, 512 US 594, 603-604 (1994)("[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context.). In any event, this Court did not order briefing on this issue and so the People do not expound on the argument.

[56]*Taylor*, *supra*.

[57]*Id.* at 370-373.

testimonial under *Crawford* and *Davis*.[58] The admission of the statement, according to this Court, was governed solely by the rules of evidence. This Court did not even reference *Bruton* in that case, undoubtably because the facts were so different: *Bruton* involved a codefendant's testimonial confession, whereas *Taylor* involved a codefendant's casual statement to an acquaintance.

In this case, *Bruton* cannot apply to the main statement at issue—Lawson's statement to Webb—because it was a non-testimonial statement to an acquaintance and, therefore, not subject to analysis under the Confrontation Clause. Indeed, as *Crawford* articulates, the Confrontation Clause is only concerned with *testimonial* hearsay. So long as the statement at issue is not meant to be used at a future criminal trial, there is no Confrontation Clause issue. And where there is no Confrontation Clause issue, there can be no *Bruton* issue.

2. The reading of Webb's prior recorded testimony into the record presents no *Bruton* issue because it *still* did not turn Lawson's non-testimonial statement into a testimonial one.

The fact that Lawson's statement to Webb was non-testimonial does not, in this case, end the analysis because that statement was admitted via the prior recorded testimony of Webb, testimony which only the codefendant had the opportunity to

[58] *Id.* at 378.

cross-examine. But the fact that the non-testimonial statement in issue was admitted through an acquaintance's testimony does not suddenly create a *Bruton* issue where one did not previously exist. Once again, *Bruton* only applies to a *codefendant's* testimonial confession, not a non-party's testimony. Indeed, Webb was just the means through which an otherwise admissible statement was admitted; his testimony added nothing to the case besides Lawson's statement, and his testimony was admissible against Lawson under MRE 804(b)(1).

To apply the very narrow holding of *Bruton*—that a limiting instruction is not sufficient to eliminate the risk of the jury considering the "powerfully incriminating" nature of a codefendant's formal confession implicating defendant—to this situation would be to extend it far beyond its logical boundaries. In *Bruton*, the codefendant's out-of-court police confession was undeniably inadmissible against defendant under the Confrontation Clause. In this case, the underlying statement—i.e. the *entire* reason Webb's testimony was relevant—was to introduce the codefendant's non-testimonial statement which, had Webb appeared for trial, would have been admissible against defendant. *Bruton* cannot apply to either level of hearsay here because this case does not, on any level, present a situation where a jury heard a "powerfully incriminating" *formal* confession made by a codefendant. What the jury heard, instead, was an informal, non-testimonial statement made by a codefendant to

an acquaintance and, incidentally, a testimonial statement made by that acquaintance. Neither of these categories implicate *Bruton*.

B. It does not matter that defendant was unable to confront Webb at the preliminary examination because the jurors were instructed that they could not consider Webb's prior testimony, including Lawson's statement to Webb, against defendant.

Because *Bruton* does not apply in this case, the *Bruton* exception to the effectiveness of limiting instructions likewise does not apply. Accordingly, absent the very narrow *Bruton* exception, the law here assumes—like it does in countless other situations—that the jurors followed their instructions.[59] Absent extreme circumstances like *Bruton*, the Court "presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instruction

[59]See e.g. *People v Graves*, 458 Mich 476 (1998)("It is well established that jurors are presumed to follow their instructions."); *People v Hana*, 447 Mich 325, 351 (1994)(noting that the risk of prejudice stemming from joint trials may be "allayed by proper instructions"); *People v Manning*, 434 Mich 1, 8 (1990)(". . . the trial court's unobjected to cautionary instruction on defendant's right to be tried solely on the evidence of his own guilt appropriately addressed the potential prejudice inherent in the inculpatory nature of accomplice testimony."); *People v Abraham*, 256 Mich App 265, 279 (2003)("Jurors are presumed to follow their instructions, and instructions are presumed to cure more errors."); *Zafiro v United States*, 506 US 534, 540-541 (1993).

given them."[60] "The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue."[61]

For example, in *Tennessee v Street*, the United States Supreme Court analyzed a case where the prosecutor relied heavily on a "detailed confession" that the defendant had given authorities. Testifying in his own defense, the defendant then recanted his confession, claiming that the sheriff had coerced him into repeating a confession given by his alleged accomplice. To rebut the claim, the prosecution had the sheriff read the accomplice's confession to the jury. The prosecutor then referred to the accomplice's confession in his closing argument to dispute the defendant's claim about being forced to repeat the confession.[62]

In *Street*, the Supreme Court upheld the conviction, holding that the evidence had been admitted for a proper purpose and that the jury had been properly instructed to only consider the testimony for that limited purpose. While the Court acknowledged *Bruton* and acknowledged that the accomplice's testimonial confession "could have been misused by the jury,"[63] the Court nevertheless concluded "that the

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[60]*Francis v Franklin*, 471 US 307, 324 n. 9 (1985).

[61]*Tennessee v Street*, 471 US 409, n. 6 (1985), citing *Frazier v Cupp*, 394 US 731, 735 (1969).

[62]*Id*. at 410-413.

[63]*Id.* at 414.

trial judge's instructions were the appropriate way to limit the jury's use of [the accomplice's confession] in a manner consistent with the Confrontation Clause."[64]

In this case, the jury received multiple instructions regarding Webb's testimony, instructing them not only that Webb's testimony could not be used against defendant, but also that Lawson's statement could not be used against defendant.[65] Specifically, the jurors were instructed immediately before Webb's testimony was read into the record that the transcript could only be used against defendant Lawson and not against the other defendant.[66] And then again, during jury instructions, the court stated:

> The Court further instructs the jury that the testimony of Mr. Wesley Webb was read into the record. That testimony must not be used against Mr. Bruner during your deliberations.[67]
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> * * *
>
> Defendant Lawson's statement has been admitted as evidence only against him. It cannot be used against defendant Bruner and you must not do so.

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[64] *Id.* at 417.

[65] In addition to the trial court's instructions, the people repeatedly mentioned in closing argument that the jury was not to use any portion of Webb's preliminary exam testimony against defendant *Bruner*.

[66] 12/1, 16-17.

[67] 12/3, 75.

> You must not consider that statement in any way when you decide whether the defendant Bruner is guilty or not guilty.[68]

Because Webb's testimony was not admitted against defendant, he had no constitutional right to confront it. Moreover, defendant cannot overcome the presumption that the jury followed the command not to consider it against him.

C. Even if one assumes the jurors could not be trusted to follow the limiting instructions, the admission of Webb's testimony was nevertheless harmless.

While there was no Confrontation Clause issue because Webb's testimony was not admitted against defendant, any potential error in the jurors hearing the testimony was harmless in light of the nature of the statement itself and the other evidence presented at trial.[69]

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[68]Id. at 90. The original instruction inaccurately told the jury that Lawson's statement could not be used against Lawson. After conferring with the attorneys, the court issued a correct instruction regarding the statement. Id. at 88-90.

[69]*People v Banks*, 438 Mich 408 (1991)(holding that a *Bruton* error does not require reversal where "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error."); *People v Carines*, 460 Mich 750, 774 (1999)("If the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt.")

1. Webb's prior recorded testimony included a cross-examination from Lawson's counsel, who had the same motive to cross-examine the testimony as defendant's counsel would have had.

Webb's prior recorded testimony from Lawson's preliminary examination was read in full, including the thorough cross-examination completed by Lawson's counsel at the examination. Lawson's defense counsel had the exact same motive in cross-examining Webb's testimony as defendant's counsel would have had: (1) to get Webb to backtrack from his police statement about whether Lawson told him about "Blank" taking the gun, and (2) to discredit Webb by pointing out his own criminal troubles and by implying he made up the testimony to receive a sentence reduction in his own, unrelated case. Counsel did this quite effectively at the examination.

Because the jurors heard a cross-examination of the witness, this is not the type of case where the testimony was admitted by the People without any sort of challenge from the defense. While defendant's own counsel did not get the opportunity to cross-examine him, the People are hard-pressed to imagine what else defendant's counsel could have gotten from the witness, and defendant has proffered nothing. Thus—while the testimony was properly only admitted against Lawson because defendant did not have his own opportunity for cross-examination—the fact the jury heard the statement did not actually prejudice defendant because the jury also heard

a cross-examination very similar to the one they would have heard had defendant's counsel had the opportunity.

2. The content of Webb's testimony was not "powerfully incriminating" because it was largely cumulative of the other evidence already properly admitted against defendant.

Again assuming the jurors disregarded the limiting instruction, defendant was not prejudiced by the reading of the redacted testimony because Lawson's statement was only arguably incriminating as to defendant in light of the fact that nearly everything Lawson told Webb was already admitted at trial against defendant via properly admitted evidence.[70] Indeed, the jury heard from several witnesses that the two were at the club together, that defendant fought with a girl, that both defendants left when defendant Bruner was kicked out by the security guards, that the two defendants drove around the block multiple times in defendant's Charger, that defendant Bruner got out just before the shooting occurred, and that Lawson called Bruner shortly after the shootings.

[70]While it does not ultimately matter in the Confrontation Clause analysis because there is no *Bruton* error and the testimony was not used against defendant, the People note that the parties did redact the statement to further reduce any potential prejudice to defendant. That being said, the People acknowledge that—had this case involved the admission of Lawson's testimonial confession, which it did not—changing "Box" to "Blank" likely would not have cured the error under *Gray*. But, in the context of a harmless-error analysis, any prejudice was reduced by the redaction or, at the very least, it served to remind the jurors that the testimony could not be used against defendant.

The only "new" information in Webb's testimony was that Lawson was aware there was a gun in the car, thereby making Lawson's mere-presence defense less believable. But, as it related to defendant, the fact that he may have had a gun was already strongly implied when the security guards testified that defendant refused to be searched when he went back to the club. Specifically, Price testified that defendant was denied entrance because, when the guards went to search him, he said "no, ain't nobody touching me." And, of course, there was the obvious evidence that the victims had both been shot immediately after they noticed defendant was no longer riding around the block as the passenger in Lawson's vehicle. Given the cumulative nature of Lawson's statement as it relates to defendant, this was not the sort of "powerfully incriminating" evidence discussed in *Bruner* or many of the other cases dealing with statements by codefendants.[71]

3. The other evidence proving that defendant was the shooter was so overwhelming that the admission of this statement was harmless.

In addition to the fact that the statement was largely cumulative to the other evidence presented as it relates to defendant, its admission was also harmless because

[71]For example, the codefendant's statement to an acquaintance that was admitted in *Taylor*, was extremely harmful to the defendants. There, the codefendant told the acquaintance that the other two defendants had kidnapped and shot the victim. Despite this, this Court still held that the statement was admissible. *Taylor*, *supra*, 482 Mich at 371-372, 379-380.

the evidence that defendant was the shooter was overwhelming in this case, making the prejudicial effect of Lawson's statement insignificant. Multiple witnesses testified that defendant got in a fight in the club and then was irate and agitated when he was restrained and then ejected from the club. He continued to act "loud and crazy" as he was removed, and one security guard heard him say, "I'll be back," in an aggressive tone. Another guard saw defendant "pointing like I'm going to get you . . ." The guard read defendant's lips and interpreted them as saying, "[Y]ou are going to get yours." Based on these facts, the jury could easily infer from defendant's threats that he was planning to retaliate against the guards.

When he returned to get his keys, he banged on the door of the club and then was denied access because he refused to be searched for weapons. After that, he continued to watch the club from the sidewalk across the street until he again went back to the club and demanded his phone. Again, he refused to be searched for weapons. He was later picked up by Lawson in a gray Charger and the two slowly circled the club. On the last circle around the club, the guards noticed defendant was no longer in the vehicle. As the Court of Appeals opinion points out, "The jury could infer that Lawson dropped Bruner off before reaching the club, and then parked on the other side of the club by Sweetwater Tavern, drawing the guards' attention toward the Charger." At that point, the shooter fired multiple shots at the guards' backs.

Further, defendant's former girlfriend testified that, after the shooting, she did not hear from defendant for a year even though they had plans that night. And the victim's mother, who had regularly communicated with defendant before the shooting, never heard from him again after the shooting. Given this substantial evidence, there is no doubt that defendant would have been convicted even if Lawson's statement to Webb had not been introduced. Again, Lawson's statement was not a "powerfully incriminating" confession incriminating himself and defendant. At the very most, it put a gun in the Charger that the two defendants were driving. But, again, the jury could have already inferred defendant had a gun from the other evidence presented at trial, particularly that defendant repeatedly refused to be searched for weapons when he tried to return to the club.

To quote the Court of Appeals, "[g]iven Bruner's motive and threats, the inference that he was armed and had an opportunity to shoot the guards while they focused on Lawson and the Charger, and his behavior after the shooting, the jury could conclude beyond a reasonable doubt that Bruner was the shooter." Thus, even if the Court were to assume the jurors considered Lawson's statement, it is nevertheless clear that any potential prejudice was harmless.

Ultimately, there was no *Bruton* issue in this case because there was no out-of-court testimonial confession made by a codefendant introduced at defendant's trial.

Accordingly, because there was no *Bruton* issue, the instructions to the jury not to consider Webb's testimony against defendant alleviated any potential Sixth Amendment problem. And, even if the jurors did not properly heed those instructions, any such prejudice was harmless in light of the nature of the challenged statements and the other evidence admitted against defendant. The Court of Appeals properly affirmed defendant's convictions, and this Court should likewise deny defendant's application for leave to appeal.

Relief

WHEREFORE, the People respectfully request that this Court deny defendant's application for leave to appeal.

Respectfully submitted,

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